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RETIREMENT INCENTIVES IN THE TWENTY FIRST CENTURY: THE MOVE TOWARD EMPLOYER CONTROL OF THE ADEA

Judith A. McMorrow*

I. INTRODUCTION: RETIREMENT AND THE ADEA

Retirement has become an increasingly important topic of public policy discussion in the United States,¹ as well as an accepted, and even cherished, goal for many American workers.² Consequently, it is not surprising that the Age Discrimination in Employment Act (ADEA)³ recognized, somewhat inartfully, the importance of retirement. When originally passed, the ADEA expressly provided an exemption for any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of the ADEA.⁴ In 1986, Congress amended the ADEA to eliminate mandatory retirement, but made clear in its legislative history that voluntary retirement was a valid employee choice.⁵ The interaction of retirement and the ADEA became

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1. See, e.g., John M. Cornman & Eric R. Kingson, *Trends, Issues, Perspectives, and Values For the Aging of the Baby Boom Cohorts*, 36 *THE GERONTOLOGIST* 15 (1996).

2. See WILLIAM GRAEBNER, *A HISTORY OF RETIREMENT: THE MEANING AND FUNCTION OF AN AMERICAN INSTITUTION 1885-1978*, at 269-70 (1980).

3. See 29 U.S.C. §§ 621-634 (1994).

4. See Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended 29 U.S.C. § 623(f)(2) (1994)). See Judith A. McMorrow, *Retirement and Worker Choice: Incentives to Retire and the Age Discrimination in Employment Act*, 29 *B.C. L. REV.* 347, 350 (1988), for a history of this provision. The Older Worker Benefit Protection Act (OWBPA), Pub. L. No. 101-433, 104 Stat. 978 (1990), (codified as amended at 29 U.S.C. §§ 621-626 (1990 & Supp. 1996)), amended the ADEA to distinguish between seniority systems and bona fide employee benefit plans, and altered the subterfuge language to make clear that Congress was disavowing restrictive Supreme Court interpretations of "subterfuge." See S. REP. NO. 101-263 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1534-35.

5. See *Age Discrimination in Employment Act Amendments of 1986*, Pub. L. No.

more explicit when Congress amended the Act again in 1990 to allow employers to observe the terms of "a voluntary early retirement plan consistent with" the purposes of the ADEA.⁶ The 1990 amendments also expressly allowed waivers as part of retirement incentive plans.⁷ Consistent with this pattern of amendments under the ADEA, courts similarly have been solicitous to the interests of both employers and employees in providing retirement incentives, arguably to the extent of minimizing other goals of the ADEA such as promoting employment.⁸

While the ADEA clearly has a strong interest in the relationship between work and retirement, the ADEA is one small part of a mosaic of government regulation that shapes our nation's retirement policy. Social security, the nation's largest retirement program, covers ninety percent of all workers.⁹ Private pensions have grown dramatically in recent years, with almost half of the population now covered by private pensions.¹⁰ Meanwhile, the government has taken a much more active role in regulating these private pensions through the Employee Retirement Income Security Act (ERISA).¹¹ Congress has recognized that "pension benefits are special under federal

99-592, 100 Stat. 3342 (codified at 29 U.S.C. §§ 622-624, 630-631) (stating that no such plan shall require or permit the involuntary retirement of an individual because of age); McMorrow, *supra* note 4, at 359-61.

6. See OWBPA, Pub. L. No. 101-433, 104 Stat. 978 (1990) (codified as amended at 29 U.S.C. §§ 621-626 (1990 & Supp. 1996)). The express protection of voluntary early retirement incentive plans is codified at 29 U.S.C. § 623(f)(2)(B)(ii) (1994). See also S. REP. NO. 101-263, at 28-29 (1990), reprinted in 1990 U.S.C.C.A.N. 1509, 1534.

7. See 29 U.S.C. § 626(f) (1994).

8. See, e.g., Michael C. Harper, *Age-Based Exit Incentives, Coercion, and the Prospective Waiver of ADEA Rights: The Failure of the Older Workers Benefit Protection Act*, 79 VA. L. REV. 1271, 1274 (1993); McMorrow, *supra* note 4, at 371-77.

9. See Murray Gendell & Jacob S. Siegel, *Trends in Retirement Age By Sex, 1950-2005*, MONTHLY LAB. REV., July 1992, at 22, 23.

10. See *id.*

11. 29 U.S.C. §§ 1001-1461 (1994).

law.”¹² Through its regulation of both governmental and private programs, the federal government has undertaken a dominant role in shaping retirement policy in the United States.¹³

Compared with the scope of Social Security and ERISA regulation, the ADEA is not a dominant vehicle for shaping federal retirement policy. Its focus is more limited. The ADEA’s express goals are directed toward eliminating discrimination in employment, promoting the employment of older workers based on ability, and helping employers and workers meet the problems arising from the impact of age on employment.¹⁴ The ADEA was modeled after Title VII of the Civil Rights Act of 1964,¹⁵ and was promoted using the language of civil and individual rights.¹⁶ While acknowledging the civil rights origins of the ADEA, we must not place the ADEA in too small a conceptual box by ignoring its important complementary role in shaping and reinforcing developments under Social Security and ERISA. In particular, the ADEA helps to shape how employers exercise the discretion given them under these other federal statutes.¹⁷

The goal of this essay is to analyze whether the ADEA, as currently structured, can achieve its non-discrimination goals

12. S. REP. NO. 101-263 at 22-23 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1528 (emphasis omitted). The Senate Report identified some of the ways in which federal law recognizes the special status of pensions. Unlike severance (or other benefits), pensions are protected through statutory vesting provisions; they are guaranteed by a federal insurance agency; and they are administered by means of a federal system of reporting, disclosure, and fiduciary obligations. Congress, through ERISA, has expressed a commitment to regulate, protect, and underwrite the pension benefits of American workers.

13. *See* GRAEBNER, *supra* note 2, at 267 (asserting that the federal government is “the foremost arbiter of retirement”).

14. *See* 29 U.S.C. § 621(b) (1994).

15. 42 U.S.C. § 2000e (1994).

16. *See, e.g.*, 29 U.S.C. § 621 (1994) (“prohibit[ing] arbitrary age discrimination in employment”); 136 CONG. REC. S13, 597 (daily ed. Sept. 24, 1990) (statement of managers accompanying the OWBPA citing agreement “to protect the civil rights of millions of older Americans” and “to protect older workers”); Howard Eglit, *The Age Discrimination in Employment Act at Thirty: Where It’s Been, Where It Is Today, Where It’s Going*, 31 U. RICH. L. REV. 579 (1997) (describing the origins of the ADEA).

17. *See, e.g.*, *Houghton v. SIPCO, Inc.*, 38 F.3d 953, 959 (8th Cir. 1994) (finding no ADEA liability for announcing retirement benefit reductions permissible under ERISA, and no ADEA violation in offering older employees early retirement option not available to younger employees).

and also be an effective vehicle to complement retirement policy in the twenty-first century. To that end, this essay will examine two ideas. First, retirement incentives are likely to play an increasingly popular role as employers attempt to regulate retirement patterns among their workers.¹⁸ Any retirement plan includes incentives, in the sense that the program is more attractive when structured to give higher benefits. Retirement incentives as used in this article refers to circumstances in which employers provide additional benefits not included as a regular and permanent part of a pension plan.¹⁹ Retirement incentives promise to become more popular because of both the changing work and retirement patterns of American workers and the increasingly limited opportunities for employers to encourage retirement through traditional programs. Changes in Social Security and private pensions leave employers with retirement incentives as one of the few ways in which to encourage the exit of workers from the work force.

At the same time that employers are likely to find retirement incentives increasingly attractive, the ADEA, as interpreted and amended, is providing employers with increased control and autonomy in how to structure those incentives. In particular, the ADEA's affirmation of waivers in retirement incentives and the trend toward arbitration of ADEA statutory employment disputes both function to move retirement incentives into private control of employers. This privatization has two public policy consequences. Employees are deterred from bringing arguably discriminatory conduct to the attention of the public policy bodies such as the Equal Employment Opportunity Commission (EEOC) and the courts, thereby diminishing the non-discrimination goals of the ADEA. In addition, by allowing employers to screen their actions from public scrutiny, the ADEA becomes a less effective vehicle for complementing national retirement policy.

18. See Olivia S. Mitchell & Anna M. Rappaport, *Innovations and Trends in Pension Plan Coverage, Type, and Design*, in *THE FUTURE OF PENSIONS IN THE UNITED STATES* 53, 55 (Ray Schmitt ed., 1993) (using pensions for "regulating retirement flows").

19. See Phyllis H. Mutschler, *Early Retirement Incentive Programs (ERIPs): Mechanisms for Encouraging Early Retirement*, in *HANDBOOK ON EMPLOYMENT AND THE ELDERLY* 182, 183 (William H. Crown ed., 1996).

II. CHANGES IN WORK AND RETIREMENT: ANTICIPATING THE TWENTY-FIRST CENTURY

Recent studies have demonstrated what we all may know intuitively, but which only has recently been empirically demonstrated: financial incentives, particularly those from Social Security and private pensions, influence work decisions throughout our work life, and particularly in the decision of when and how to exit the work force.²⁰ To better understand how those incentives affect the retirement decision, we need to have a fuller understanding of retirement.

When Congress passed the ADEA in 1967, it operated under a single model of retirement in which the significant majority of workers went from full-time work to full-time retirement.²¹ This simple model of either full-time work or full-time retirement, however, is not accurate for many older workers. We have an increasing awareness of "new retirement" in which workers engage in "productive aging."²² This takes the form of increasing numbers of workers continuing to work in some form after ostensibly retiring. Some workers shift from career jobs to full- or part-time post-career jobs.²³ These post-career "bridge" jobs often involve fewer hours, greater flexibility and less stress.²⁴ Others switch to related work. For example, a survey of law professors who retired between 1983 and 1988 showed that approximately seventeen percent continued full-time work for compensation, and over half continued to work at least part-time for compensation after retiring from their tenured faculty positions.²⁵ Their postretirement activities included teaching,

20. See JOSEPH F. QUINN ET AL., *PASSING THE TORCH: THE INFLUENCE OF ECONOMIC INCENTIVES ON WORK AND RETIREMENT* 234-38 (1990).

21. See *id.* at 240.

22. See, *PRODUCTIVE AGING: ENHANCING VITALITY IN LATER LIFE* (R. Butler & H. Gleason eds., 1985); Laura Pappano, *The New Retirement: Six Ways to Make the Most of Life After Work*, B. GLOBE MAG., Feb. 16, 1997, at 16.

23. See Christopher J. Ruhm, *Historical Trends in the Employment and Labor Force Participation of Older Americans*, in *HANDBOOK ON EMPLOYMENT AND THE ELDERLY* 81, 98 (William H. Crown ed., 1996); John R. Besl & Balkrishna D. Kale, *Older Workers in the 21st Century: Active and Educated*, A Case Study, *MONTHLY LAB. REV.*, June 1996, at 18, 27.

24. See Ruhm, *supra* note 23, at 98.

25. See Judith A. McMorro & Anthony R. Baldwin, *Life After Law School: On*

consulting, arbitration, and practice.²⁶ These findings are consistent with other studies, which have demonstrated that from one-third to one-half of men partially retire, with an average continued-work-life of over five years.²⁷ Although women have been less studied, preliminary data indicates that substantial numbers of women are also engaging in partial retirement.²⁸ One study found that a quarter of workers engaged in "reverse retirement" by reentering the work force at some point during the eight years after initially retiring.²⁹ This pattern of engaging in some form of work as a transition from full-time work to full-time retirement means that many workers will continue to supplement their income during this transition time. It makes moving out of the full-time career job more affordable for many workers, and provides a larger pool of part-time workers to replace the retirees.³⁰ This, in turn, may make retirement incentives more attractive to employers.

This pattern of transitional work is likely to become more pronounced in the future. When Congress passed the ADEA, the employment rates among older workers (primarily men) had declined steadily over the preceding decades.³¹ The impact of these shifts is magnified as the U.S. population ages. Both scholars and pop culture have followed the baby boomers into middle age and anticipate their increasing numbers in retirement.³² These changes are more than academic. Politicians, economists, pension planners, gerontologists, and the stock market are all predicting how the aging of our population will impact our economy, our political life, our culture, and our

Being a Retired Law Professor, 41 J. LEGAL EDUC. 407, 415-16 (1991).

26. *See id.* at 415.

27. *See Ruhm, supra* note 23, at 98.

28. *See QUINN ET AL., supra* note 20, at 26. Part-time work before retirement was found to be more common for women than for men. *See id.*

29. *See Ruhm, supra* note 23, at 98.

30. *But see Eglit, supra* note 16, at 684-89 (discussing factors that may serve as disincentives to hiring older workers).

31. *See id.* at 664-68. This fairly steady decrease in the retirement age may be stabilizing, although demographers and economists who closely monitor the trends draw varying conclusions about shifts in the employment rates. *See Besl & Kale, supra* note 23, at 19.

32. *See generally* ERIC KINGSON, *THE DIVERSITY OF THE BABY BOOM GENERATION: IMPLICATIONS FOR THEIR RETIREMENT YEARS* (1992); Besl & Kale, *supra* note 23; Cornman & Kingson, *supra* note 1.

individual savings plans. The possible impact of these changes is complex. Over time, a higher percentage of the work force will be older, and often paid more than younger employees. This may encourage employers to consider retirement incentives, particularly when many of these retirees would consider part-time participation. On the other hand, the decreased pool of younger workers may discourage employers from offering incentives because the more senior workers are simply too valuable to the employer.

Other pressures are likely to encourage older workers to continue working in some form. Concerns about health care costs and allocations are likely to affect the retirement decisions of many workers. If the employee receives health insurance through their employer, the employee must make plans to obtain insurance coverage until Medicare becomes available at age sixty-five. Even after age sixty-five, Medicare coverage is incomplete and, increasingly, workers need to consider health insurance availability and cost in retirement.³³ If affordable health care is not available, workers will have to remain in the work force if they are able.

The newer, older workers are also more educated than the oldest generation, and this higher education rate may encourage workers to remain in the work force longer than their parents.³⁴ Past retirement patterns indicate that workers with more schooling are more likely to continue working past fifty-five.³⁵ By the year 2020, college graduates will outnumber high school dropouts (the least educated group of workers) by three to one.³⁶ This tendency to work longer may be due, in part, to the fact that more educated workers tend to earn higher incomes, which creates a financial incentive to continue working.³⁷

This pattern of continued work may be more significant for older women than older men. Since women live longer than

33. See KINGSON, *supra* note 32, at 45-48.

34. See Besl & Kale, *supra* note 23, at 18.

35. See *id.* at 20.

36. See *id.* at 22.

37. See *id.* at 19.

men and are participating in the work force at a greater rate than in the past, there is a likelihood of continued participation of women in the work force. Rising divorce rates may also affect the availability of pensions, and therefore the affordability of retirement, particularly for women.³⁸ Changing race and ethnic diversity in the population may also shape retirement patterns. Currently, older black women have the highest rate of labor force participation among workers fifty-five and older.³⁹ This may reflect lower wages, which make traditional retirement simply unaffordable. If wage disparities drop, the effect of race on the work participation rate of older workers may change.

Rising college costs are also reshaping how employees use their long-term savings. As American families delay marriage and childbirth, these workers will face significant college costs at the very time that they would traditionally be considering retirement.⁴⁰ Because families are smaller, workers also have a smaller family network for support in retirement.⁴¹

Taken as whole, these demographic changes are likely to mean that a larger number of workers will be inclined to continue in the work force. Government regulation increasingly encourages, or at least has removed many disincentives to, continued work by older people.⁴² This is implemented through a series of legislative changes.⁴³ The 1983 Amendments to the Social Security Act are phasing in a variety of changes to reduce work disincentives. The retirement age at which a worker will receive full benefits will slowly increase from sixty-five to sixty-seven (to be completed by 2027).⁴⁴ The Amendments will eventually phase in an increase in the early retirement penalty and will slightly increase the delayed retirement credit given to

38. *See id.* at 26.

39. *See id.* at 24.

40. *See* KINGSON, *supra* note 32, at 9-11 (noting that the median age for a first marriage has increased by more than three years since the mid-1950s, and that baby boomers have postponed childbirth).

41. *See id.* at 11.

42. *See* Barry L. Friedman, *Social Security Wealth and Labor Supply Incentives*, in HANDBOOK ON EMPLOYMENT AND THE ELDERLY 144 (William H. Crown ed., 1996).

43. *See* QUINN ET AL., *supra* note 20, at 193.

44. *See* 42 U.S.C. § 416(l) (1994).

workers who continue to work after the normal retirement age.⁴⁵ The 1986 amendments to the ADEA eliminated mandatory retirement for all but a small group of workers.⁴⁶ The ADEA now also prohibits employers from reducing or eliminating pension benefit accruals because of age.⁴⁷

Trends in private pension plans also are reducing disincentives to continue working. Defined benefit plans, those that guarantee a certain payment each month, were at one time the most common form of pension plans.⁴⁸ Defined benefit plans typically contain work disincentives by setting maximum pension benefits and limiting the years of service that count toward the pension. Older, long-term employees may have accrued the maximum available pension after thirty years, while still in their fifties. Employers, however, increasingly favor defined contribution plans,⁴⁹ in which the employer and employee contribute to the plan and the funds are invested until the employee reaches retirement age.⁵⁰ Unlike defined benefit plans, which are often based wholly on employer contributions, defined contribution plans rely primarily on the employee's own contributions from pre-tax earned income, the amount of which is based largely on the employee's farsightedness and ability to save.⁵¹ Employees have to earn sufficient income in order to devote some of the income to future planning. Furthermore, this change in pension funding is occurring at the same time that personal savings rates have declined.⁵² Because defined contribution plans are based on a retirement investment account, which belongs to the employee, the employer has fewer

45. See *id.*; see generally Friedman, *supra* note 42, at 147.

46. See Age Discrimination in Employment Act Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (codified at 29 U.S.C. §§ 622-624, 630-631).

47. See 29 U.S.C. § 623(i)(1)(A) (1994); see also *Lockheed Corp. v. Spink*, 116 S. Ct. 1783 (1996) (holding that ERISA does not prohibit conditioning payment of increased pension benefits on retiree's release of employment-related claims, and that amendments to ERISA and ADEA that prohibit age-based cessation or reduction of benefit accruals do not apply retroactively).

48. See John A. Turner & Tabitha Doescher, *Pensions and Retirement*, in *HANDBOOK ON EMPLOYMENT AND THE ELDERLY* 165, 180 (William H. Crown ed., 1996).

49. See QUINN ET AL., *supra* note 20, at 247.

50. See Mitchell & Rappaport, *supra* note 18, at 56.

51. See *id.* at 57.

52. See Besl & Kale, *supra* note 23, at 18.

opportunities to make changes in the retirement account that are likely to encourage retirement.⁵³ Early retirement subsidies and postretirement benefit increases are usually not possible under defined contribution plans.⁵⁴

These changing social forces and retirement patterns will inevitably affect how employers use retirement incentives. Larger economic forces are likely to encourage workers to continue work. The drop in the number of defined benefit plans reduces the employer's ability to use standard pension plan changes as a way to encourage retirement. Yet some employers may still consider replacing full-time career employees with part-time and lower cost employees (including other semi-retirees). All of these factors are likely to increase the role of retirement incentives as one of the few vehicles for employers to control the number of older workers in their work force.

Against this backdrop of changing retirement patterns, we have seen a move toward unmonitored employer control of retirement incentives under ADEA. Two important developments have pushed this trend forward: the affirmation of waivers under the ADEA for retirement and exit incentives (coupled with changes in the law that increase plaintiff's burden in establishing an ADEA case), and the rise of arbitration and other forms of alternative dispute resolution (ADR) as forums for resolving legal challenges to retirement incentives. These changes have made it harder to assess the legal impact of the employer's conduct. They shield much of the employer's activities from close legal scrutiny. Consequently, we need to examine these developments closely.

III. THE MOVEMENT TOWARD UNMONITORED EMPLOYER CONTROL OF RETIREMENT INCENTIVES

A. *Retirement Incentives and Exit Programs: Waiver & Choice*

As retirement incentive programs became popular in the 1980s, employers increasingly used waivers or releases from

53. See Turner & Doescher, *supra* note 48, at 180.

54. See Mitchell & Rappaport, *supra* note 18, at 60.

liability as a condition to granting the additional benefits.⁵⁵ While waivers and releases were initially challenged under the ADEA, courts generally rejected an absolute prohibition of waivers and releases, as long as they were knowing and voluntary.⁵⁶ The standards used to evaluate voluntariness varied among the courts, however, and the 1990 amendments to the ADEA, through the Older Worker Benefit Protection Act (OWBPA), expressly addressed the conditions under which releases are valid under the ADEA.⁵⁷

To better understand waivers, it is helpful to identify common plan designs and methods of implementation. Retirement and exit incentives can be designed in several ways. Sometimes the incentive is structured as an exit incentive that is not expressly tied to retirement. For example, an employer may offer a lump sum payment, a payment based on years of service (\$1000 for each year of employment), or a percentage of salary, which may or may not be tied to retirement.⁵⁸ Some incentives are structured as pure retirement incentives, offering enhanced pension-related benefits to employees near retirement age, such as adding years of service to the pension formula or providing insurance benefits until the employee is eligible for Medicare.⁵⁹ Both systems are likely to impact employees in the protected class.

These retirement and exit incentives can occur via individual or group offers. In the first form, an employer may individually negotiate with a single employee to give the employee financial incentives in return for the employee's resignation. The OWBPA sets out seven criteria for a valid waiver between an individual

55. See S. REP. NO. 101-263, at 26-27, *reprinted in* 1990 U.S.C.C.A.N. 1532 ("Since the 1978 amendments to the ADEA, there has been a dramatic rise in the number of early retirement incentive programs used by employers."); 1 HOWARD C. EGLIT, *AGE DISCRIMINATION* § 5.63 (2d ed. 1994).

56. See EGLIT, *supra* note 55, § 5.64.

57. See generally OWBPA, Pub. L. No. 101-433, 104 Stat. 978 (1990) (codified as amended at 29 U.S.C. §§ 621-626 (1990 & Supp. 1996)). The OWBPA uses the term release, but for purposes of this discussion release is functionally the same as a waiver. Both function to preclude the employee from pursuing legal action against the employer under the ADEA because of a contractual agreement.

58. See S. REP. NO. 101-263, 27-28 at (describing these programs as lawful early retirement incentives).

59. See Harper, *supra* note 8.

employee and the employer: (1) the waiver must be in understandable language; (2) the waiver must specifically refer to ADEA rights and claims; (3) the waiver cannot include claims after the date of the document (i.e., no prospective waiver); (4) the waiver must include consideration; (5) the employee must be advised in writing to consult an attorney; (6) the employee must be given twenty-one days to consider the offer; and, (7) the employee must be given a seven-day revocation period.⁶⁰ Since this involves, at least in theory, a one-on-one negotiation, the OWBPA does not require the employer to provide data about what other employees might have received. Sometimes the employer and employee engage in meaningful negotiations. In other circumstances, the employer has a standard offer that generally does not vary.

These seven criteria demonstrate that Congress views incentives and waivers as a contract, which must conform to standard contract provisions. Congress did elect to give some additional protections, such as time to consider the offer and a revocation period.⁶¹ While a positive step, these protections only put retirement incentives on a par with purchasing a time-share in many jurisdictions.⁶²

In many instances employers do not engage in individual negotiations, but instead offer an incentive package to a group of employees. Group retirement and exit incentives have become very popular in recent years as a method of implementing the euphemistic "downsizing." If a waiver is offered as part of a group program, the OWBPA requires employers to disclose the program's eligibility criteria, time limits, the job titles and ages of individuals eligible or selected for the program, and the ages of all individuals in the same job class or unit who are not eligible or selected.⁶³ The OWBPA also requires that employers provide the employees forty-five days to consider the agree-

60. See 29 U.S.C. § 626(f)(1) (Supp. 1996).

61. See, e.g., Mary Lou Savage, et al., *Time Share Regulation: The Wisconsin Model*, 77 MARQ. L. REV. 719, 740 (1994) (discussing regulation of selling practices, including a five-day revocation period).

62. See *id.*

63. See 29 U.S.C. § 626(f)(1)(H) (1994).

ment.⁶⁴ In theory, this additional information about eligibility criteria and similarly situated employees gives the offeree an opportunity to determine both whether he or she is being treated fairly vis-a-vis the larger group, and whether the group offer has a discriminatory impact.

These waiver/release provisions evolved from the laudable goal of clarifying the legal standard for evaluating waivers and preventing abuses in providing retirement incentives. But setting out waiver provisions in detail also establishes a clear road map to employers. To minimize liability, a risk-adverse employer will establish a form waiver. If an employer complies with the minimum requirements of the ADEA by following this road map, the employer is likely to be free of liability once the employee signs the waiver and the revocation period has passed.⁶⁵ While predictability is a very positive value in most circumstances, here we are not predicting lawful behavior, but only freedom from liability. Employers could put together incentives that otherwise would violate the ADEA, but offer attractive payments or buyouts under the shadow of layoffs. Risk-adverse employees are likely to take the offer. The employer's underlying conduct is shielded from public review.

In addition, while the terms of the agreement and the waiver might be subject to "negotiation," realistically that negotiation is only open to the more highly compensated employees. Again, if an employer complies with the OWBPA, courts are much less likely to conclude that the waiver was involuntary. The challenges to the employer's plans will be likely dismissed at summary judgment based on the employee's waiver.

64. See 29 U.S.C. § 626(f)(1)(F)(ii) (1994).

65. See, e.g., *Blakeney v. Lomas Info. Sys.*, 65 F.3d 482, 484 (5th Cir.), cert. denied, 116 S. Ct. 1042 (1996) (holding that a waiver is knowing and voluntary if it complies with statutory requirements of OWBPA; employer's failure to comply with OWBPA creates voidable contract that is ratified by employee's retention of severance pay); *Hodge v. New York College*, 940 F. Supp. 579, 582 (S.D.N.Y. 1996). But see *Anderson v. Lifeco Serv. Corp.*, 881 F. Supp. 1500, 1503-04 (D. Col. 1995) (finding that a release conformed to the minimum requirements of § 626(f) and also satisfied the additional requirement that it was knowing and voluntary, because of employee's constructive and perhaps actual knowledge, and because of negotiation with employer).

For group offers, the waiver provisions try to provide employees with information that might allow a knowledgeable attorney to determine if a prima facie case of age discrimination is present by the choice of who is offered the plan. This information is largely form over substance. Employers are understandably heartened—and employees dismayed—by the increasingly high standard for proving intentional discrimination under federal non-discrimination statutes, including the ADEA.⁶⁶ An employee who sees a pattern of disparate impact on older workers also has an increasingly thin legal theory that can only be pursued at significant legal risk.⁶⁷ Given the current legal climate, an employee faces an extraordinarily hard choice in giving up a sum certain for proceeding in an increasingly skeptical judicial forum. In addition, the decision to retire is traumatic and many employees will simply go with the path of least resistance because they cannot focus on making a major life choice in twenty-one to forty-five days. These concerns cause some commentators to argue that the waiver provisions function more like a prospective waiver than a settlement of claims.⁶⁸

Mr. Spink's experience is illustrative.⁶⁹ Mr. Spink was reemployed by Lockheed Corporation in 1979. He declined a retirement incentive offer, and refused to sign a waiver because the company made clear that he and similarly situated employees would not receive pension credit for their earlier service. Mr. Spink sued. The Supreme Court agreed with the employer that the 1986 changes in the law that prohibited age discrimination in benefit accruals did not apply retroactively.⁷⁰ Mr. Spink had

66. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 615 (1993) (firing an employee to prevent vesting in a pension plan, although illegal under ERISA, is not alone a violation of the ADEA); Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation: St. Mary's Honor Center v. Hicks, Pretext, and the "Personality" Excuse*, 17 BERKELEY J. EMP. & LAB. L. (forthcoming July 1997); Roger J. Johns, Jr., *Proving Pretext and Willfulness in Age Discrimination Cases after Hazen Paper Company v. Biggins*, 45 LAB. L. J. 221 (1994).

67. See *Hazen*, 507 U.S. at 611; Mack A. Player, *Wards Cove Packing or Not Wards Cove Packing? That is Not the Question: Some Thoughts on Impact Analysis under the Age Discrimination in Employment Act*, 31 U. RICH. L. REV. 819 (1997).

68. See, e.g., Harper, *supra* note 8.

69. See *Lockheed Corp. v. Spink*, 116 S. Ct. 1783 (1996).

70. See *id.* at 1786. ERISA does not prohibit conditioning payment of increased pension benefits on retiree's release of employment-related claims. See *id.* at 1787. The amendments to ERISA and ADEA that prohibit age-based cessation or reduction

to incur considerable financial risk—and he lost—just to bring the policy issue to a public forum. If we were talking about two corporate entities, we might feel more comfortable with allocating litigation risks in this way. But with the ADEA, we typically have an individual employee challenging a much larger corporate entity.

Even if we dismiss these concerns as part of many hard choices against which the law cannot guard, we still have a system in place that functionally encourages employers to shield plans from later public scrutiny through waivers. While the understaffed EEOC still has the right to challenge such plans, employees waive any compensation if a violation is found.⁷¹ This reduces the employee's incentive to bring the details of the plan to a public forum. In addition, many courts have held that employees must give back the retirement incentive before they are allowed to challenge it in court (the tender/ratification doctrine).⁷² Liberal use of waivers promises to impede the non-discrimination goals of the ADEA.

Waivers also impede the ability of the ADEA to complement our national retirement policies. As noted above, federal law has removed many disincentives to continued work. As our population ages, we will see a rise in the number of retired workers whose Social Security must be funded in part by the smaller number of full-time workers. Just as Social Security will slowly increase the eligibility age for benefits, Congress may need to take more aggressive action to encourage workers to remain in the work force. For example, Congress could conclude that the stated ADEA purpose of promoting employment of older workers based on ability is more important than allowing employers to meet the problems arising from the impact of age on employment through retirement incentives.⁷³ Congress

of benefit accruals do not apply retroactively. *See id.*

71. *See, e.g., Coventry v. United States Steel Corp.*, 856 F.2d 514, 524 (3d Cir. 1988).

72. *See, e.g., Jill R. Bodensteiner, Note, Post-OWBPA Developments in the Law Regarding Waivers to ADEA Claims*, 46 WASH. U. J. URB. & CONTEMP. L. 225 (1994) (describing history of waivers under the ADEA and developing conflict on the validity of the tender/ratification doctrine).

73. *See* 29 U.S.C. § 621 (1996) (citing two of the stated purposes of the ADEA); *see also* Mutschler, *supra* note 19, at 192-93 ("Inducing workers to leave their jobs

may need to impose increased restrictions on retirement incentives to give greater assurance that retirement is truly voluntary. With waivers, questionable retirement incentives are much less likely to be reviewed in court, impeding the flow of information about what employers are doing and how employees are reacting to retirement incentives.

B. *Dispute Resolution: Forum and Choice*

A second, independent development under the ADEA promises to push retirement incentives further from public scrutiny. Over the last fifteen years, the United States Supreme Court has enthusiastically endorsed arbitration of commercial disputes as an alternative to traditional court-based litigation.⁷⁴ The Supreme Court's primary vehicle for encouraging arbitration has been the 1925 Federal Arbitration Act, which has been the subject of a series of very favorable opinions.⁷⁵ These favorable interpretations were confined initially to more traditional commercial settings, such as the relationship between franchisees and the arbitrability of anti-trust issues in disputes between foreign and domestic corporations.⁷⁶ Federal employment discrimination claims had been viewed as beyond the scope of mandatory arbitration in large measure due to the Supreme Court's decision in *Alexander v. Gardner-Denver Co.*⁷⁷ In a unanimous decision, the Court held in *Alexander* that the employee was entitled to trial de novo on his race discrimination complaint under Title VII, even though he had submitted his discharge to final arbitration under a non-discrimination clause

prior to their planned date of retirement frequently curtails individual savings or may cause retirees to withdraw funds sooner than they had planned. Clearly, in these instances, what is good for GM is not good for the nation.⁷⁸)

74. See Stephen L. Hayford, *Commercial Arbitration in the Supreme Court 1983-1995: A Sea Change*, 31 WAKE FOREST L. REV. 1 (1996) (finding that between 1983 and 1995 the Supreme Court issued 13 opinions under the Federal Arbitration Act strongly embracing arbitration of commercial disputes).

75. See 9 U.S.C. §§ 1-307 (1994).

76. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1984) (discussing the arbitration of the Sherman Anti-Trust Act between Japanese and Puerto Rican corporations); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (discussing the arbitration of statutory rights under the California Franchise Investment law).

77. 415 U.S. 36 (1974).

of a collective bargaining agreement. The Court expressly distinguished between contractual disputes and resolution of rights created under Title VII of the Civil Rights Act of 1964.⁷⁸

The distinction between business contractual disputes and federal statutory employment disputes was significantly eroded in 1991 when the Supreme Court changed the operating presumption about the arbitrability of statutory employment discrimination claims. In *Gilmer v. Interstate/Johnson Lane Corp.*,⁷⁹ the Supreme Court concluded that the ADEA does not prevent ADEA claims from being subject to mandatory arbitration.⁸⁰ In *Gilmer*, the employee signed a New York Stock Exchange securities representative application, which contained a clause requiring arbitration of any controversy arising out of the employment or termination of the employment. Mr. Gilmer was discharged at age sixty-two and filed the requisite age discrimination complaint with the EEOC. The Supreme Court held that statutory claims, such as Mr. Gilmer's ADEA claim, may be subject to mandatory arbitration agreements under the Federal Arbitration Act.⁸¹ Only a clear intent from the ADEA to preclude arbitration would be sufficient to overcome the strong federal policy toward arbitration.⁸² *Gilmer* drew expressly on the line of cases in which the Court has actively supported moving statutory causes of action into a private forum.⁸³ More importantly, the Court expressly distinguished *Alexander* as reflecting a "mistrust of the arbitral process" that has been undermined by more recent decisions.⁸⁴

Alternatives to litigation, such as arbitration, have tremendous virtues that are worthy of being implemented as federal

78. *See id.* at 56 ("Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII").

79. *See id.* at 35.

80. 500 U.S. 20 (1991).

81. *See id.* at 35.

82. *See id.* at 26.

83. *See* Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1997 SUP. CT. REV. 331, 369-71 (forthcoming) (on file with author); Hayford, *supra* note 74, at 29-32.

84. *Gilmer*, 500 U.S. at 34 (quoting *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 231-32 (1987)).

policy.⁸⁵ Arbitration, in general, has simpler procedures that are generally more accessible and understandable to employees. Consequently, they are usually quicker and less expensive to pursue for both employers and employees.⁸⁶ Arbitration often allows for more creative remedies, such as outplacement.⁸⁷ In many cases employees with lower wages cannot afford counsel to pursue statutory claims. Often the damages are so small that lawyers are unwilling to take the case on contingency. As the Supreme Court noted in *Gilmer*, the ADEA contains a provision to encourage informal resolution of disputes, which involves a voluntary resolution of the claim under the auspices of the EEOC.⁸⁸ We can, however, embrace these many advantages of alternative dispute resolution, including mediation, without endorsing wholesale transfer of employment disputes to mandatory arbitration. Imposing mandatory arbitration for statutory employment discrimination claims based on a pre-employment agreement (or a statement in an employee handbook for an employee-at-will) is much more problematic than the Supreme Court acknowledges.

As a practical matter, only the very highest-level employees have individually negotiated employment agreements. In most cases, employees are either handed a standard agreement (like Mr. Gilmer as a securities representative) or are given an employment manual and told that these are the terms and conditions of employment, should the employee decide to work for the employer. In the employment context, the mandatory arbitration clauses often look like a contract of adhesion. We do not call them such because the Supreme Court has viewed arbitration over the last fifteen years as a content-neutral act. The Court gave lip service in *Gilmer* to the notion that an agreement to arbitrate might have "resulted from the sort of fraud or overwhelming economic power that would provide grounds" for a contract revocation.⁸⁹ But agreements that involve mere un-

85. See generally Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660 (1985).

86. See Stephen W. Skrainka, *The Utility of Arbitration Agreements in Employment Manuals and Collective Bargaining Agreements for Resolving Civil Rights, Age and ADA Claims*, 37 ST. LOUIS U. L.J. 985, 992-93 (1993).

87. See *id.* at 991.

88. See *Gilmer*, 500 U.S. at 29.

89. *Id.* at 33 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,

equal bargaining power were not seen as problematic and the Court essentially placed the take-it-or-leave-it agreements between employers and employees "on the same footing as other contracts."⁹⁰

In addition, unlike labor or large commercial arbitration, the employer is likely to be the dominant repeat player and the employee a one-time participant in arbitration. This lends itself, at least in theory, to a hidden preference for the interests of the repeat players, who will have the ability to hire the arbitrator again.⁹¹ Unfortunately, unlike the courts, there is no centralized repository of data that allows us to monitor the number of cases going to employment arbitration, although it appears that the numbers are still quite small.⁹² But preliminary studies of the available data show interesting patterns emerging. It appears that employees who bring claims typical of executive-level managers (e.g., breach of express contract) fare well in arbitration and win even more often than employers. The small sampling to date makes it unclear whether lower-level, non-executive employees fare as well in arbitration. These are typically the employees most in need of a strong forum to help equalize the power relationship between employers and employees.⁹³ It is too soon to make adverse judgments, however, since these non-executive workers are the same employees who tend to fare poorly in traditional litigation as well.⁹⁴ But the concern for repeat player preference in arbitration is very much a live issue.

The ADEA, and other statutory claims, also contain express authorization for suit in federal court. This implicitly gives

473 U.S. 614, 627 (1984)).

90. *Id.* at 33 (noting there was no indication that Gilmer, "an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause This claim of unequal bargaining power is best left for resolution in specific cases.").

91. See Lisa B. Bingham, *Emerging Due Process Concerns in Employment Arbitration: A Look at Actual Cases*, 47 LAB. L.J. 108 (1996) (discussing empirical study of employment cases arbitrated by the American Arbitration Association in 1993, comparing outcomes under the older commercial rules and the new Employment Dispute Resolution Rules).

92. See *id.* at 112-13.

93. See *id.* at 115-16.

94. See Skrainka, *supra* note 86, at 998-99.

litigants the ability to use the procedural powers of the courts to develop evidence. In contrast, the Federal Arbitration Act does not contain clear provisions for discovery (beyond subpoena power), or for judicial review of the substantive interpretation of employment discrimination law.⁹⁵ The very attributes that tend to make arbitration quicker and cheaper (fewer procedural rules, less discovery, lower evidentiary standards) also open the door for procedural abuses.⁹⁶ Consistent with its other arbitration opinions, the Supreme Court in *Gilmer* rejected challenges to procedural differences between the court and arbitral forums as a basis for precluding arbitration.⁹⁷ The Court was unclear what minimum standards for fairness would be required for a valid arbitration.

Not only did the original ADEA not anticipate wholesale mandatory arbitration based often on unnegotiated take-it-or-leave-it employer requirements, the Federal Arbitration Act (FAA) was not passed with statutory employment discrimination claims in mind. The FAA was passed in 1925 and could not have anticipated arbitrators interpreting a vast array of statutory employment discrimination law and sets up no training criteria for doing so. Even more troublesome, the Supreme Court's interpretation of the FAA has essentially pre-empted the ability of most state law to equalize the bargaining power between the parties.⁹⁸

Gilmer does not provide strong or clear legal constraints on what employers can incorporate into their alternative dispute resolution (ADR) procedures, such as limiting discovery, limiting the time for bringing an arbitration request, and limiting the use of counsel. Courts may impose some limits in extreme cases,⁹⁹ but given the strong policy toward arbitration, there is no

95. See 9 U.S.C. §§ 1-307 (1994); see also Carrington & Haagen, *supra* note 83, at 347.

96. See Ronald Turner, *Compulsory Arbitration of Employment Discrimination Claims With Special Reference to the Three A's—Access, Adjudication, and Acceptability*, 31 WAKE FOREST L. REV. 231, 235-36 (1996).

97. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30-32 (1991).

98. See Carrington & Haagen, *supra* note 83, at 379-91.

99. See, e.g., *Heurtebise v. Reliable Bus. Computers*, 550 N.W.2d 243, 247 (Mich. 1996) (holding employee handbook did not create enforceable arbitration agreement for employee's gender discrimination claim because employer did not intend to be bound

assurance that courts will impose significant procedural requirements on arbitration.¹⁰⁰

In the absence of meaningful public guidance, some of the ADR and labor groups in the private sector have begun to address the unfairness inherent in the employer control over the arbitration process. Representatives of several of the major ADR providers (American Arbitration Association, Endispute, Federal Mediation and Conciliation Service, Society of Professionals in Dispute Resolution, National Academy of Arbitrators) and others with an interest in employer-employee relations (ABA, International Ladies' Garment Workers' Union, ACLU, National Employment Lawyers Association) created a Task Force which developed a "Due Process Protocol" as a guideline for fair employment arbitration proceedings.¹⁰¹

The Task Force disagreed on many policy issues concerning the timing of an agreement to mediate and/or arbitrate a statutory dispute. They did agree on several important procedural issues. Employees should have the right to be represented by a spokesperson of their own choosing, and they should have access to all information reasonably relevant to mediation or arbitration of their claims.¹⁰² Mediators and arbitrators should have the skills to conduct the hearings and a knowledge of the statutory issues; they should be impartial, preferably selected from a roster determined on a non-discriminatory basis.¹⁰³ The mediator or arbitrator "has a duty to disclose any relationship which might reasonably constitute or be perceived as a conflict of interest."¹⁰⁴ Perhaps most importantly, the mediators and arbitrators "should reject cases if they believe the procedures lack requisite due process."¹⁰⁵ Consistent with this Due Pro-

by any provision in handbook).

100. *See, e.g., Continental Airlines v. Mason*, No. 95-55343, 1996 WL 341758 (9th Cir. June 19, 1996) (compelling arbitration under employee handbook of sex discrimination, wrongful termination, and infliction of emotional distress claims; an arbitration procedure that does not provide for discovery or legal counsel is not unconscionable).

101. *See Bingham, supra note 91, app. at 122.*

102. *Id.*

103. *See id. at 123-24.*

104. *Id.*

105. *Id. at 124.*

cess Protocol, the American Arbitration Association has created National Rules for the Resolution of Employment Disputes. It is too soon to tell if this private effort to implement fairness will curb potential abuses.

Only a handful of reported cases have emerged since *Gilmer*, but there is reason to believe that employers will slowly move toward increasing their use of arbitration for ADEA and other statutory employment discrimination claims. *Gilmer* coincides with a strong private employer movement toward alternative dispute resolution. Employers are increasingly looking toward in-house dispute resolution schemes that will head off employee conflicts long before they reach court. Early intervention through ADR is a positive development. Companies often implement a tiered system based on discussing complaints, using hot-lines, or conducting peer reviews to identify and resolve disputes before they become a *cause celebre*. At the next level, an in-house or outside mediator assists the parties in crafting a mutually acceptable resolution. If these in-house and voluntary schemes fail, employers turn to arbitration (whether binding or non-binding) to hear each side and make findings.¹⁰⁶ This last stage leaves open the strongest possibility of unreviewable harm to aggrieved employees.

The movement toward arbitration of statutory employment disputes, such as ADEA claims, may impair the non-discrimination goals of the statutes. For all the reasons noted above, it is questionable whether arbitration will be a better forum for achieving the public policy of eliminating age discrimination. That concern is compounded in the area of waivers. Given the strong congressional imprimatur of waivers with retirement incentives, it is a small step to conclude that waiver provisions will eventually contain standard arbitration clauses for interpreting the waiver agreement. Any cases that are not covered by the waiver contract could be covered by an employee manual or individual employment contract requiring arbitration. Increasing reliance on waivers and arbitration is likely to push

106. See generally Edward Baig, *When It's Time to Do Battle With Your Company*, BUS. WK., Feb. 10, 1997, at 130-31.

many legal challenges to retirement incentives behind closed doors.

IV. THE CONSEQUENCES OF MOVING RETIREMENT INCENTIVES BEHIND CLOSED DOORS

The increasing use of waivers and the development of mandatory arbitration of ADEA claims diminish scrutiny of age discrimination complaints, particularly in the area of retirement incentives. Statutes that provide private rights of action give aggrieved individuals the power to choose whether to enforce their perceived rights. Like a private attorney general, the law is using those individuals (and giving them incentives) to implement public policy. Allowing private rights of action supplements the underfunded enforcement efforts by the EEOC. That shared responsibility is a very rational system of coordinated enforcement that gives those with the most incentive (the harmed individual) the power to challenge the employer's decision.¹⁰⁷ But empowering employers to set the conditions for resolving statutory employment discrimination disputes, rather than regulating that power, is ripe with abuse. To call upon an old bromide, the fox is now guarding the chicken coop.

Gilmer argues that arbitration can further important social policies through its remedial and deterrent functions.¹⁰⁸ Even assuming that is true, it is less clear whether a "double choice" model of privatizing disputes through waiver of both claims and forums, as allowed with retirement incentives, can promote the ADEA's social policies in this context. If embraced by many employers, there will be little deterrence left because we will have far fewer enforceable legal limitations to retirement incentives.

Both waivers of the right to sue for retirement incentives and of the right to go to court (substituted by mandatory arbitration) are superficially the result of "choice." Many eloquent commentators have noted the bright and dark sides of choice.

107. See Judith A. McMorrow, *Who Owns Rights: Waiving and Settling Private Rights of Action*, 34 VILL. L. REV. 429-50 (1989).

108. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27-28 (1991).

One highly problematic aspect of choice is that it selects a status quo as a starting point. This has significant practical implications and subtle sociological consequences. Both releases and arbitration clauses are typically offered on a take-it-or-leave-it basis by employers. There is seldom equality of bargaining power. While this may strike some as less troublesome in the waiver context, where employers are offering a consideration that they need not provide, there is typically no consideration for arbitration clauses. There is seldom meaningful negotiation for employees who receive lower compensation. Class distinctions emerge. The choice model also has significant implications for institutionalizing race and gender distinctions.

We should care that there is less public scrutiny of employer retirement incentives. Although employees seem to be embracing more creative retirement options, it is unclear whether the non-discrimination goals are fully achieved when employers can shield their retirement incentives from public scrutiny. We also do not know whether larger public policy concerns, such as encouraging older workers to continue in the work force to create an appropriate balance between full-time and retired workers, might be eroded by employers' aggressive use of retirement incentives. Certainly, we will have less "percolating" of issues in the lower courts. We will have less intermediate analysis to help us understand what constitutes fair retirement incentives that balance the freedom of choice for employees and employers and the larger public policy concerns. These are the dangers of implementing public policy in private.